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Supreme Court of the United States

October Term, 1957

No. 377

WILLIE BENNETT,

Petitioner,

against

S.S. MORMACTEAL, her engines, etc., and MOORE McCORMACK LINES INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Willie Bennett, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (hereto appended and marked Appendix A), affirming a decree of the United States District Court for the Eastern District of New York (hereto appended and marked Appendix B), dismissing a longshoreman's personal injury libel, on motion following exceptive allegations made on behalf of the respondent.

I.

Opinions Below

The opinion of the District Court does not appear in the Official Reporter. The Court of Appeals for the Second Circuit affirmed the decree of the District Court on the opinion below, without a separate opinion.

II.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered on March 13, 1958 (Appendix A).

The jurisdiction of the district court was based on a maritime action within the admiralty and maritime jurisdiction of the District Courts of the United States as conferred by Act of June 25, 1948, c. 646, 62 Stat. 931, amended May 24, 1949, c. 139, Sec. 79, 63 Stat. 101, 28 U. S. C. Sec. 1333. The jurisdiction of the court below was based on Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. Sec. 1291.

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. Sec. 1254(1) and by Act of June 25, 1948, c. 139, Sec. 106, 63 Stat. 104, 28 U. S. C. Sec. 2101(c).

III.

Questions Presented

1. In a suit in Admiralty, *in rem*, against a vessel, for damages for personal injuries caused by its unseaworthiness and/or negligence, does Section 5 of the Longshoremen & Harbor Workers Act preclude a suit for damages against the ship, where the owner and operator of the vessel is also the employer of the injured seaman (longshoreman)?

2. Was the Longshoremen & Harbor Workers Act intended to give steamship companies an option to deprive such injured maritime workmen of their traditional right to sue the offending steamship company *in personam*, or

the offending vessel *in rem* (for damages for personal injuries), by the device of directly employing such seamen (longshoremen), instead of engaging them through an independent stevedoring firm?

3. Where seamen (longshoremen) who specialize in loading operations, are employed directly by the steamship company, instead of through an independent stevedoring firm, are they deprived of the right to sue *in personam* for damages for personal injuries caused by the vessel's negligence, under the provisions of the Jones Act (46 U. S. C. A., Sec. 688), and/or caused by unseaworthiness under the General Maritime Law, i.e., are they limited solely to the Workmen's Compensation remedy by virtue of Section 5 of the Longshoremen & Harbor Workers Act?

IV.

Federal Laws and Statutes Involved

The General Maritime Law, which is the common-law of the sea, provides that seamen who happen to specialize in cargo loading operations (longshoremen) are today entitled to sue for damages for personal injuries caused by the negligence of the ship operator and/or the vessel's unseaworthiness, even when employed by an independent stevedoring firm, as they could when employed directly by the steamship companies, in order to carry out the broad beneficient policies of the law.

See *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872 (1946), where the court stated at page 90:

> "There could be no question of petitioner's liability for respondent's injuries, incurred as they were here, if he had been in petitioner's employ rather than hired by the stevedoring company. That an owner is liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel

or its appurtenant appliances and equipment has been settled law in this country even since the Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760."

The General Maritime Law also personifies the ship, providing for *in rem* liability of the offending vessel, regardless of whether there is, or is not, *in personam* liability on the part of the operating steamship company.

Canadian Aviator Ltd. v. *U. S.*, 324 U. S. 215, 224, 65 S. Ct. 639, 644 (1945);
Grillea v. *U. S.*, 232 F. (2d) 919 (C. A. 2nd, 1956).

The Jones Act (46 U. S. C. A. Section 688) provides as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides on in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

The Jones Act provided a remedy applicable to all "seamen", including those who engaged solely in longshore activities.

Atlantic Transport Co. v. *Imbrovek*, 234 U. S. 52, 34 Sup. Ct. 733 (1949);

Int'l Stevedoring Co. v. Haverty, 272 U. S. 50, 47 Sup. Ct. 19 (1926);
Uravic v. *Jarka*, 282 U. S. 234, 51 Sup. Ct. 111 (1931).

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, 44 Stat. 1424, 1426, 33 U. S. C. Secs. 901, 905:

> "The liability of an employer prescribed in Section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law, or in admiralty, for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow-servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

V.

Statement of the Case

The issues herein have been determined without a trial, solely on exceptive allegations. The libel was filed in Admiralty against both the vessel, *in rem*, and the employer steamship company, *in personam*.

The libel alleged that on or about May 29th, 1953, one Willie Bennett was working as a longshoreman aboard the vessel, *S.S. Mormactral*, a vessel operated by respondent,

Moore McCormack Lines, Inc., then lying in navigable waters in the port of New York. On that occasion, a hatch cover gave way beneath him, causing him to fall and sustain injuries. It was alleged that the hatch cover gave way because of the negligence and/or unseaworthiness of the vessel, its appliances and appurtenances, and the operating steamship company.

Proctors for the vessel and its owner then filed exceptions to the libel, seeking a dismissal of the suit for the following reasons: Moore McCormack Lines, Inc. was not only the owner and operator of the vessel, but it was also the direct employer of the longshoremen who were working on the ship, including the libellant. The exceptions further claimed that since libellant's employer was covered by Workmen's Compensation, the vessel and its operator became immunized from legal liability for damages, by virtue of the provisions of 33 U. S. C. A. 905. These exceptions were sustained, the suit was dismissed, and this was affirmed on appeal.

The courts below have held that the Longshoremen's Compensation Act deprived such injured workers, not only of their right to sue the ship operator *in personam* for damages, but also deprived them of their traditional right to sue the vessel *in rem*, in instances in which the personal injuries are brought about by the negligence and/or unseaworthiness of the vessel.

It is necessary to consider the historical background, in order to appreciate the impact of this holding.

VI.

Argument

1. Originally, the seamen themselves not only sailed their vessels, but also loaded and unloaded the cargo. By the time th Jones Act (46 U. S. C. A., Sec. 688), was

adopted, the age of specialization had set in, and ship operators generally were engaging independent stevedoring companies as contractors, to perform the loading and unloading of their vessels. The ship operators would employ the seamen; the stevedoring companies would employ the longshoremen. It was soon held that those maritime workmen who were now specializing solely in cargo handling operations (longshoremen), did not lose their status as seamen, and that they were entitled to sue the independent stevedoring firms which employed them, for damages, under the Jones Act, as they could when employed directly by the steamship companies.

Atlantic Transport Co. of W. Va. v. *Imbrovek*, 234 U. S. 52, 34 Sup. Ct. 733 (1914);
Int'l. Stevedoring Co. v. *Haverty*, 272 U. S. 50, 47 Sup. Ct. 19 (1926);
Uravic v. *Jarka*, 282 U. S. 234, 51 Sup. Ct. 111 (1931).

These decisions have never been overruled, so as to change the right of maritime workers to sue *employer-steamship companies* for damages for personal injuries when they are, as here, directly employed by them.

Respondents argue that when Congress enacted the Longshoremen's and Harbor Workers' Act in March, 1927, only five months following the *Haverty* case, it must have intended to overrule the force of those decisions. But in the *Haverty* case, the injured longshoreman was employed by an independent stevedoring company, and not by a steamship company. Therefore, the intent being to overrule *Haverty*, Congress was simply providing a compensation act for independent stevedoring companies, in lieu of Jones Act liability.

2. The decision of the Court below is contrary to the intention of the Congress in passing the Longshoremen's and Harbor Workers Compensation Act and is unsupported by the specific terms of the Act, or its legislative history, particularly with reference to *in rem* liability.

The Compensation Act was enacted only five months after the decision of this Honorable Court in *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926) which had found a longshoreman employed by an independent stevedore to be a "seaman" under the Jones Act. It was this employment relationship that Congress had in mind when it provided for an exclusive liability of the "employer" for compensation.

While in no way conclusive, nevertheless the Congressional Committee hearings prior to the adoption of the Compensation Act are of some assistance. Thus, in describing before the Senate Judicial Committee how repairs are made, Mr. Chlopek, then President of the International Longshoremen's Association, agreed that it was the same as loading and unloading and declared "The steamship owner contracts with a stevedoring company to load or discharge his cargo." Hearings, Sen. Jud. Comm., 69th Congress 1st Session on S. 3170 (March 16, 1926), p. 24.

In the hearings before the Committee on the Judiciary of the Senate (69th Congress, 1st Session) on S. 3170, held on March 16 and April 2, 1926, there was included a discussion of the previous attempts to have longshoremen covered by state compensation laws. Attorney J. P. Chamberlain, representing the Longshoremen's Union, stated at page 19:

> "* * * it was based on the theory that it was in practice very difficult to administer a compensation law affecting these employees in ports all over the country—and those employees were carpenters, upholsterers and men of various types who were local workers, working not for the ships but for local employers, that is, for local stevedores, local drydock companies, and local contractors for repairs to vessels—and that they should be taken care of as are other workers under the state law."

William F. Dempsey of Dorchester, Mass., representing the International Longshoremen's Association, stated at page 25:

> "* * * When the ship is tied up to the dock the operating crew are through with the vessel—except to clean places where the captain wants them to clean up. Then the owner of the vessel, or the agency of the vessel leaves the work of unloading the cargo and loading the cargo to others, lets it out to contract. The contractor is termed the stevedore, and in our agreements he is called the master stevedore. We are termed longshoremen. The master stevedore of one contractor hires certain gangs of men to work * * *."

Similarly, in the hearings before the Committee on the Judiciary of the House of Representatives (69th Congress, 1st Session) on H. R. 9498, held on April 8, 15 and 22, 1926, Mr. Cletus Keating, representing the American Steamship Owners Association, stated there, at page 100:

> "* * * these stevedores and shipwrights who are principally affected are employees of local concerns."

Finally, Section 52 of the Act, as proposed in both the House and Senate bills, originally provided:

> "No vessel shall be allowed clearance by the collector of any port unless the master or agent shall satisfy the collector that the provisions of this act requiring the securing of compensation for work done in respect to such vessel have been complied with."

This Section was replaced by a significantly different provision, which became 33 U. S. C., Section 937 of the Act. This change was suggested by Mr. Cletus Keating, representing the American Steamship Owners Association (see p. 99 of the Hearings before the Judiciary Committee of the House of Representatives, *supra*). Section 937, as enacted, provides:

> "No stevedoring firm shall be employed in any compensation district by a vessel or by hull owners until

> it presents to such vessel or hull owners a certificate issued by a deputy commissioner * * * that it has complied with the provisions of this chapter requiring the securing of compensation to its employees * * * ."

On this change, Mr. Chlopek stated at page 214:

> " * * * the proposal as passed by the Senate—and as we are asking you to recommend it, gentlemen—absolutely creates no hardship upon the vessel. The law simply would require the vessel owner to ask the stevedore who is going to do his ship stevedoring, 'Have you complied with this act?' And if he has failed to prove that he has complied with it he can not hire that man * * * ."

The punitive provisions of Section 937, limited as they are to stevedoring firms, as distinct from the language in the bill as originally proposed, would seem to be not without significance.

In the *Pacific Pine*, 31 F. (2d) 152 (D. C. Wash., 1929), an injured longshoreman employed by an independent stevedoring firm, sued a vessel *in rem*, based upon a claim that his injuries had been caused by negligence and unseaworthiness. The vessel sought a dismissal on the ground that workmen's compensation was his exclusive remedy, and the right to sue a "third person" as preserved by the Compensation Act, did not include a suit against the vessel. In sustaining the longshoreman's right to sue the vessel *in rem* for damages, Judge Cushman stated at page 1955:

> "The dominant purpose of the Longshoremen's and Harbor Workers Compensation Act being to put a new lamp in the place of old ones, it is not reasonable to conclude that the old rights, which were intended to be extinguished, would be left to be inferred from part of a section relating to procedure."

The *Pacific Pine* was cited with approval in *Seas Shipping Co. v. Sieracki; supra*, at Note 21, but in both of these

cases, the injured workmen was in the employ of an independent stevedoring contractor, and was not on the direct payroll of the steamship company.

As recently as June 2, 1958, this Honorable Court granted certiorari in *Hahn v. Cross Island Sand & Gravel Co.*, 320 P. 2nd 668 (Sup. Ct. Oregon, 1958), in which case the Oregon courts had held that the Longshoremen & Harbor Workers Act affords an exclusive remedy to a maritime workman suing his employer for injuries sustained aboard a barge on Oregon navigable waters. Although the injured man was employed directly by the company, he claimed that he was entitled to sue his employer for damages under a state liability act, which permitted such suits, based upon allegations of negligence. Having consented to review that decision, this Honorable Court will be called upon there to consider whether the Longshoremen's Compensation Act provides an exclusive remedy, or whether such a maritime employee may elect to sue his employer for damages under a state liability act. In the suit at bar, the petition herein respectfully requests this Honorable Court to review another aspect of the same problem, i.e., whether the Longshoremen's Compensation Act provides an exclusive remedy, or whether the right to sue the employer steamship operator and the vessel for damages, survives under federal law, i.e., the Jones Act and/or General Maritime Law.

The question raised by this petition has never been passed upon on the merits by this Honorable Court, and it is growing in importance by reason of the following additional developments in the industry:

3. We have seen that the seamen originally loaded and unloaded their ships; but with increased industrialization, they were replaced by stevedoring firms which provided longshoremen employed by the contractors.

In 1932 the United States Department of Labor noted a developing practice of a return to direct employment by

shipowners among the "larger shipping companies". ("Cargo Handling and Longshore Labor Conditions," U. S. Dept. of Labor, Bureau of Labor Statistics, No. 550 [Feb. 1932], p. 2). By 1951, the practice of direct employment had become quite widespread. A New York Board of Inquiry investigating the Port of New York found that "Many shipping concerns engaged in coastal and intercoastal trade * * * often engage men directly to do their stevedoring work * * *." (Final Report to the Industrial Commissioner, State of New York from Board of Inquiry on Longshore Industry Work Stoppage October-November, 1951, Port of New York [Jan. 22, 1952], pp. 48-49). The practice of direct employment has become so pronounced that shipowners comprise over 40 per cent of the members of the New York Shipping Association which represents all but one of the large employers of longshoremen in their collective bargaining and labor negotiations with the union representatives of the longshoremen and related dock workers. *Final Report * * * from Board of Inqury, supra,* p. 40.

The result of the decision below is that, in the Port of New York, for example, about half of the longshoremen will be able to bring suit against a vessel for her unseaworthy and or negligent condition, while the other half will be precluded from doing so by reason of the fortuitous circumstance that the latter group is employed by the shipowners directly. While both groups have a statutory right to compensation from their employer under the Longshoremen's and Harbor Workers' Compensation Act, one group is being denied an established maritime right to recover damages for injuries, a circumstance which has been regarded as a factor in preventing accidents in the longshore industry. ("Longshore Safety Survey," Maritime Cargo Transportation Conference [National Academy of Sciences —National Research Council Pub. 459 1956], p. 7.)

The final result of the rule enunciated by the Courts below might well be the total elimination of the right of

longshoremen to bring suit against a vessel for injuries sustained due to unseaworthiness and negligence. The shipowners are thereby attempting to eliminate the cost of liability insurance to cover longshoremen, while assuming directly only the cost of workmen's compensation coverage for employee longshoremen. (This latter coverage is a burden which the ship owners now bear indirectly as part of the cost of longshore services by independent contractors.)

4. From the shipowners' point of view the decision below creates a distinction which tends to favor the larger companies by placing them in an economically advantageous position in regard to the cost factors in the shipping industry, as opposed to the steamship companies which are required to engage longshoremen through independent stevedoring firms. Such a result was clearly not a part of the original intent of the Compensation Act.

Workmen's compensation insurance rates for longshoremen are substantial. For the Port of New York the insurance rate was set at $13.00 per $100 of payroll. ("Longshore Safety Survey," Maritime Cargo Transportation Conf. [National Academy of Sciences—National Research Council Pub. 459, 1956].). If the amount of compensation premiums paid by the employer are above a minimum size, the employer is entitled to a reduction in rate commensurate with his accident record. (Hearings, Comm. on Ed. & Lab., Sp. Subcom., 84th Cong. 2nd Sess., "Bills Relating to the Longshoremen & Harbor Workers' Compensation Act," testimony of William Leslie, Jr., General Manager, National Council on Compensation Insurance, p. 157.) Only the employers who perform a great deal of loading and unloading can take advantage of this reduced rate.

Thus, the large shipping companies who employ their longshoremen directly, may not only have a reduced workmen's compensation insurance rate, but, by virtue of this decision, they can also eliminate the cost of liability damage

insurance coverage for their employee-longshoremen. Since regular need stimulates direct employment of the longshoremen (See Final Report to the Industrial Comm'r, State of New York from Board of Inquiry on Longshore Industry Work Stoppage, October-November, 1951, Port of New York, Jan. 22, 1952, pp. 48-49), for practical and economic reasons, this practice can be taken advantage of only by the large shipping companies who require a large and regular work force of longshoremen, like Moore McCormack Lines, Inc. and Grace Lines, Inc.

Further, the fundamental intention of the Act, to protect the longshoremen as he worked at his job, is seriously impaired by the decision below. As we have seen, the duty of the shipowner to a longshoreman for injuries has been described as an important factor in accident prevention. "Longshore Safety Survey," *supra*. The shipowner who contracts for his stevedoring with an independent stevedore will tend to be motivated towards safety efforts because of his liability for damages, as well as the fact that he indirectly bears the cost of workmen's compensation through the stevedoring firm's charges. This is not a question of the personal inclinations of the shipowner, but merely a recognition of the established fact that the possibility of legal liability will result in increased safety measures. (Hearings, Comm. on Ed. & Lab., Sp. Subcom., 84th Cong. 2nd Sess., "Longshoremen & Harbor Workers Compensation Act (3rd Party Liability)," Statement of the Assn. of the Bar of the City of New York, p. 110; *ibid.*, Testimony of Albert E. Rice, Counsel, American Merchant Marine Institute, Inc., p. 120.)

The policy of the law has been shaped in response to the specific needs of workers who are daily exposed to the risks inherent in maritime work and are helpless to provide adequately for their own safety. If the standards required by safe work practices are not met and injury results, the worker is entitled to be compensated in damages.

Sinkler v. *Missouri Pacific Rd. Co.*, — U. S. —, 26 L. W. 4253 (decided April 28, 1958);
Kernan v. *American Dredging Co.*, 355 U. S. 426 (1958);
Seas Shipping Co. v. *Sieracki*, *supra*.

The decision of the Court below also appears to be in conflict with the policy of the law as set forth in the above cases.

5. The District Court relied heavily upon the decisions in *Smith* v. *The Mormacdale*, 198 F. 2d 849 (3rd Cir. 1952), *cert. den.* 345 U. S. 908, and *Samuels* v. *Munson S. S. Line*, 63 F. 2d 861 (5th Cir. 1933). In both cases a longshoreman's libel *in rem* against the vessel to recover for injuries sustained was dismissed, on the basis of the Longshoremen's and Harbor Workers' Compensation Act, where the longshoreman was directly employed by the shipowner. In the *Samuels* case, Judge Bryan stated, without the citation of any authority, that Congress did not intend to declare a ship to be a "third person" as to her owner in regard to a claim against the ship by an employee of the owner. Without any specific matter to rely upon in support of its contention, that Court proceeded to assume that Congress, without saying so, had intended to eliminate the fundamental admiralty principle of the separate juridical personality of the vessel.

With all due respect to the wisdom of the Courts which decided the *Samuels* and *Smith* cases, the error in basic assumption made in the former case is compounded by the decision in the latter case. This, because in the *Samuels* case the Court stated that nowhere in the law of admiralty has a vessel been personified to the extent that it has been emancipated from its owner. This totally overlooks the many decisions which have held that in admiralty the vessel is personified to the extent that it is deemed completely emancipated from its owners.

The ship has long been recognized as capable of committing its own torts regardless of who is then in possession

of the ship or its appurtenances. It is liable *in rem* for its torts. *Canadian Aviator, Ltd.* v. *U. S.; supra.* Thus, the shipowner, by a libel *in rem* against the vessel has been held liable for the tort of its vessel, even during instances in which the ship has been converted, without its owner's knowledge or consent, into a pirate ship, *U. S.* v. *The Brig Malick Alhel*, etc., 2 How. 210, 11 L. Ed. 239, or where the tort was committed by a servant of a bareboat charterer, *The Barnstable*, 181 U. S. 464 (1901); and in other instances where the owner, out of possession, was nevertheless called upon to respond in damages, by the maritime lien on its ship, for the tort of another who was then in control of the vessel. *The John G. Stevens*, 170 U. S. 113 (1898).

The "well established distinction in admiralty between the ship owner and the ship," *Atlantic Steamer Supply Co.* v. *The S. S. Tradewind*, 153 F. Supp. 354, 357 (D. Md. 1957), is further illustrated by the often repeated pronouncements of the admiralty principle of the separate entity of the vessel.

In any event, the validity of the *Smith* and *Samuels* cases should now be reviewed by this Honorable Court, in view of the growing importance of this question, and the fact that Congressional intent has not been finally passed upon under the pertinent section of the Longshoremen's Compensation Act, and in the light of historical maritime developments.

6. In regard to the decision of the Court below, there is substantial conflict with a significant decision by other Judges of that same Court in *Grillea* v. *United States*, 232 F. 2d 919 (2nd Cir. 1956), *reversing* 229 F. 2d 691, involving a suit by an injured longshoreman who was directly hired by the bareboat charterer (Moore McCormack Lines Inc.) of a vessel owned by the respondent United States. The Court held in *Grillea* that the *in rem* liability of the vessel entitled the libelant to recover damages for its unseaworthiness, although Moore McCormack Lines, the em-

ployer, had agreed in the charter to indemnify the government against any lien arising under its operation, and although that company had made workmen's compensation benefits available.

In the instant case the District Court, in dismissing the petitioner's libel, declared "This libelant by his libel is seeking, * * * to do by indirection what he could not do directly." In contrast to this, the Court of Appeals in the *Grillea* case stated: "we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'," immediately after noting that the employer's liability under the Longshoremen's Compensation Act was only for compensation. Thus, the "indirect" method pursued by the petitioner here—a libel *in rem* of the vessel—assuming *arguendo* that he could not "directly" hold the owner of the vessel liable, while condemned by the District Court in the opinion below, was held to be proper and permissible in the *Grillea* case. The conflict between the principle enunciated in *Grillea* v. *U. S.*, and the opinion of the District Court as affirmed herein, is a clear manifestation of opposing views dealing with the fundamental admiralty concept of independent liability based on the separate personality of the vessel.

Additional proof of the underlying conflict between the *Grillea* decision and the instant case is found in the refusal of the Court in *Grillea* to give any weight to the *Smith* and *Samuels* decisions, although the final result of allowing the suit as a libel *in rem* in the *Grillea* case was that the libellant-longshoreman's employer ultimately had to bear the cost of damages; a result rejected in both the *Smith* and *Samuels* cases.

Although the District Court opinion herein states that the Longshoremen's Compensation Act was not invoked, and that the *Smith* and *Samuels* cases were not cited in the briefs on appeal in the *Grillea* case, investigation reveals that this is incorrect and that both cases were in fact cited in the appellee's answers to the petition for re-hearing.

In rebuttal to the contention of the appellee that the immunity of Grillea's employer under the Compensation Act "extends to the vessel under the operation and control of the employer-bareboat charterer" (Appellee's Answer to Appellant's Supplementary Brief), the Court of Appeals stated in its opinion, as noted above, "we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'."

VII.

Reasons for Granting the Writ

1. The Court below has adopted an improper interpretation and application of the Federal Longshoremen's Compensation Act, which results in depriving a large section of maritime workers of significant rights under the General Maritime Law of the United States and/or the Jones Act.

2. The decision of the Court below discriminates between longshoremen in giving some the right to sue for damages (if the ship happens to be operated by a third party), and denying this right to others, though they be sent by the same union local, if their injuries happen to occur on a vessel operated by a steamship company, which employs them directly.

3. The decision of the Court below results in unwarranted economic benefits in favor of the larger steamship companies, which are able to employ their seamen longshoremen directly, to the detriment of the steamship companies which must generally employ them through independent stevedoring firms, and provide third party liability coverage.

4. The Court below has failed to give effect to the intent of Congress, and the decisions of this Honorable Court, in dealing with the statutory and common-law rights involved herein.

5. The foregoing represent legal questions of importance to the maritime industry which have not been, but should be, reviewed by this Honorable Court.

WHEREFORE, your petitioner prays that a writ of certiorari may issue, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in said Court in the above entitled case, to the end that said cause may be reviewed and determined by this Court as provided by law, and upon said determination to reverse the judgment of the Court of Appeals and direct that judgment be entered accordingly, or for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
June 10th, 1958.

Respectfully submitted,

STANDARD, WEISBERG, HAROLDS & MALAMENT,
VINCENT J. LONGHI,
Attorneys for Petitioner.

LOUIS R. HAROLDS,
of Counsel.

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 167—October Term, 1957.

(Argued February 7, 1958 Decided March 13, 1958.)

Docket No. 24648

WILLIAM BENNETT,

Libellant-Appellant,

against

S. S. MORMACTEAL, her engines, etc. and MOORE McCORMACK LINES, INC.,

Respondents.

Before:

MEDINA, WATERMAN and MOORE,

Circuit Judges.

Appeal from a final decree of the United States District Court for the Eastern District of New York, in Admiralty, Matthew T. Abruzzo, *Judge*. Opinion below not reported.

Affirmed.

VINCENT J. LONGHI, New York, N. Y. (Standard, Weisberg, Harolds & Malament, Louis R. Harolds, New York, N. Y., of Counsel), *for libellant-appellant.*

KIRLIN, CAMPBELL & KEATING, New York, N. Y. (Joseph M. Cunningham, Walter X. Connor, Thomas F. Feeney and James H. Reidy, New York, N. Y., of Counsel), *for respondents.*

PER CURIAM:

The decree is affirmed on the opinion of Judge Abruzzo, filed April 2, 1957.

APPENDIX B

Opinion of Trial Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

April 2, 1957

VINCENT J. LONGHI, Proctor for Libelant; WILLIAM L. STANDARD, of Counsel; LOUIS R. HAROLDS, on the Brief.

KIRLIN, CAMPBELL & KEATING, Proctors for Respondent, Moore-McCormack Lines, Inc.; JOSEPH M. CUNNINGHAM and THOMAS F. FEENEY, Advocates.

ABRUZZO, *D. J.*:

The libelant, a longshoreman employed by Moore-McCormack Lines, Inc., to do stevedoring work on the vessel Mormacteal owned by his employer, has filed a libel in rem against the vessel and in personam against the shipowner, his employer, alleging that he was injured on May 29, 1953, when a hatch cover gave way beneath him because of the unseaworthiness of the vessel, its appliances and appurtenances. Moore-McCormack Lines, Inc., was doing its own stevedoring work.

Moore-McCormack has filed exceptions and exceptive allegations to the libel and now moves to sustain these exceptions and exceptive allegations and to dismiss the libel.

The gravamen of Moore-McCormack's motion is that the libelant was subject exclusively to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901, et seq., particularly Section 905, and

having complied with the terms and its obligations under the Act by securing compensation for its employees as provided by the Act, it is immune from any liability excepting that contained in Section 905 which provides as follows:

> "§ 905. *Exclusiveness of liability.* The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. * * * " (Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426.)

This Court is being asked to determine whether a longshoreman injured on board a ship may maintain a libel in personam or in rem against the ship on the grounds of unseaworthiness where the vessel so libeled is owned by libelant's employer and the employer has secured the payment of compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, *supra*.

The Circuit Court of Appeals for the Third Circuit, in the case of *Smith* v. *The Mormacdale*, 198 F. 2d 849, in a long, well-reasoned opinion held that under circumstances similar to those in the instant case a libel could not be maintained because the Longshoremen's and Harbor Workers' Compensation Act was the exclusive remedy accorded to a longshoreman.

The Circuit Court of Appeals for the Fifth Circuit, in the case of *Samuels* v. *Munson S. S. Line*, 63 F. 2d 861,

where the facts were identical with the case at bar, also held that a libel could not be maintained.

Conzo v. *Moore McCormack Lines*, 114 F. Supp. 956 (S. D. N. Y.), followed the reasoning in the *Smith* and *Samuels* cases, *supra*.

In this Circuit, in *Grillea* v. *United States*, 229 F. 2d 687, the Circuit Court of Appeals affirmed a judgment dismissing a libel filed by a longshoreman injured aboard a vessel. The Longshoremen's and Harbor Workers' Compensation Act was not invoked. Upon a rehearing before the same judges, the dismissal of the libel was reversed, 232 F. 2d 919. The instant libelant contends that the second *Grillea* case supports his contention that he can libel the vessel. The facts in the *Grillea* case are somewhat different than in the present libel and that case is distinguishable from the *Smith*, *Samuels* and *Conzo* cases, *supra*.

Moore-McCormack, the respondent in the present action, was the charterer in the *Grillea* case; Moore-McCormack had chartered the ship from the United States Government. One of the conditions of the charter was that the United States Government, the owner of the vessel, was to be indemnified as owner out of possession and control against any lien arising out of the operation of the vessel by the charterer, Moore-McCormack. That factor affected the decision in the *Grillea* case and is borne out by the language in the opinion which reads as follows (pp. 923-924):

> "That does not indeed answer the question whether a maritime lien can be imposed upon a ship for a claim on which no jural person is liable 'in personam.' Moreover, although in the case at bar the demisee was liable under the Longshoremen's and Harbor Workers' Act, § 901 et seq., Title 33, U. S. C. A., the liability was only for compensation—a claim different from that in suit, both in kind and amount. So far as we have found, this is a question that has never come up in the books, although, as *res integra*, we see no reason why a person's prop-

erty should never be liable unless he or someone else is liable 'in personam.' That would amount to saying that there should be no limited liability without fault, although unlimited liability without fault is not infrequently imposed. *Be that as it may, a demisee who is under only a limited liability to his employee may make himself liable to the demisor for full recovery in case the demisor is so liable to the employee. That will be true if the demisee has broken a contract with the demisor and the injuries to the employee measure the damages for the breach. In the case at bar the demisee had made such a contract, for the charter (Clause 27) contained the following promise: 'The Charterer shall indemnity the Owner against any lien * * * arising out of the operation of the Vessels by the Charterer.' Therefore, even though one thought it unjust as between the two that the demisor should be liable for full damages when the demisee was not, this clause is an answer.*" (Italics supplied.)

* * *

It is apparent that the indemnity clause had some effect in the decision in favor of the libelant. The law as determined by the Third and Fifth Circuits in the *Smith* and *Samuels* cases, *supra*, is determinative of the instant case. Neither of these cases, nor the *Conzo* case, *supra*, was cited in the briefs on appeal in the *Grillea* case. The Circuit Court did not consider the specific point involved in this motion.

Seas Shipping Co. v. *Sieracki*, 328 U. S. 85, holds that a shipowner's obligation of seaworthiness extends to a longshoreman injured while doing stevedoring work aboard a ship, but employed by an independent stevedore whom the shipowner has hired to load or unload the ship, and while working aboard a ship in navigable waters the longshoreman is comparable to some extent to a seaman because he is doing a seaman's work and incurring a seaman's hazard.

Notwithstanding that in the *Sieracki* case a longshoreman was held to have some of the rights of a seaman, the Court knows of no rule of law granting maintenance and cure to a longshoreman. He may not maintain an action under the Jones Act, 46 U. S. C. A. 688 (*Senko* v. *LaCrosse Dredging Corp.*, decided February 15, 1957, by the Supreme Court of the United States), nor can a longshoreman sue in admiralty if he was injured on land although engaged in loading or unloading a vessel (*Industrial Comm.* v. *Nordenholt Co.*, 259 U. S. 263). The Longshoremen's Act was enacted to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen, were still regarded as distinct from members of a "crew" (*South Chicago Co.* v. *Bassett*, 309 U. S. 251, 261).

This libelant by his libel is seeking, it appears, to do by indirection what he could not do directly. The ship which was libeled, the owner, and the stevedore, Moore-McCormack, are one and the same entity. In the *Grillea* case, great stress was pointed to the written contract of indemnity in fixing the liability on the owner of the vessel for any liens incurred during its charter. That was one of the dominant reasons for holding the *Grillea* libel in rem was sustainable.

There are a tremendous number of longshoremen working for various corporations in this harbor and, where the owner of any steamship does its own stevedoring work, it should have the right to not only place a legal limit on its own liability but know to what extent it is responsible and liable to its longshoremen and thereby be in a position to add the cost of its liability to its cost of operation.

The Court finds that the exceptions to the libel must be sustained and the libel dismissed.

M. T. Abruzzo,
U. S. D. J.

No. 97 LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
JUL 31 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957.

WILLIE BENNETT,

Petitioner,

against

SS. *MORMACTEAL*, her engines, etc.,

and

MOORE McCORMACK LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1957.

WILLIE BENNETT,

Petitioner,

against

SS. *Mormacteal*, her engines, etc.,

and

MOORE McCORMACK LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

THE QUESTIONS PRESENTED.

1. Are the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as The Compensation Act) inapplicable when the Employer of the longshoreman happens also to be a shipowner?

2. Should the legal fiction that a vessel is a "person" be applied so as to circumvent the exclusive liability provisions of The Compensation Act by permitting a suit *in rem* against a vessel owned by an employer?

The above questions present the real issues. The questions presented in the petition express a complaint by an individual longshoreman who has accepted compensation payments and medical benefits under The Compensation

Act and who now feels that the progressive concepts of Workmen's Compensation are inequitable because these exclusive liability provisions "deprive" and "preclude" him from bringing a suit under the General Maritime Law.

Similar questions may be asked by any of the millions of workmen who are within the statutory scheme of compensation. Every person who is entitled to the certain benefits of some compensation act must, in turn, exchange these benefits for relinquishment of the right to sue his employer, whether under the Common Law, if a worker ashore, or under the General Maritime Law, if a longshoreman or harbor worker who is injured on navigable waters within the jurisdictional scheme of The Compensation Act.

II.

Statement of the Case.

This is a suit in Admiralty by a longshoreman to recover money damages on account of an injury on May 29, 1953, against the Moore-McCormack Lines, Inc., personally, and against the SS. *Mormacteal in rem.* The *Mormacteal* was owned and operated by Moore-McCormack Lines, Inc., the same corporation named as respondent in the suit *in personam*, and which corporation has filed a claim as owner of the *Mormacteal*.

The case was decided on respondent's Exceptive Allegations in the Courts below on the following uncontroverted facts:

1. The Petitioner was a longshoreman and was neither a master, nor a member of the crew of the *Mormacteal*, the vessel on which he was injured, or of any vessel owned or operated by the respondent.

2. At the time of the accident which is the basis of this suit, the Petitioner was an employee of the respondent, Moore-McCormack Lines, Inc.

3. The Petitioner has received compensation payments under The Compensation Act (33 U. S. C. 901, *et seq.*), from May 30, 1953, to July 19, 1953.

4. These payments and additional medical benefits were received as a longshoreman employee from his employer, the respondent, Moore-McCormack Lines, Inc.

5. Respondent had fully complied with all the requirements of The Compensation Act at all the times involved.

ARGUMENT.

(1) *The Petitioner's Theories.*

Faced with the fact that there is not a single case decided on facts which took place after the enactment of The Compensation Act in 1927, which holds that a longshoreman may sue his employer, or his employer's vessel *in rem*, the Petitioner is forced to rely on unsupported theories and inapplicable legal fictions.

The Petitioner's attempt is the fifth time since 1927 that a longshoreman has sought to circumvent The Compensation Act by suing his employer's vessel *in rem*. In each case, the attempt has been unsuccessful.

The Petitioner's theories may be described as follows:

A. Although all longshoremen such as the Petitioner are entitled to the benefits and subject to the immunities of The Compensation Act and must, therefore, in consideration of assured payments and medical benefits received thereunder, give up any right to sue

his employer for money damages for personal injury (33 U. S. C. 905*), the Petitioner, nevertheless still has the right to sue his employer and thus may obtain benefits under The Compensation Act, and subsequently sue his employer,—solely because his employer happens also to be a shipowner, rather than an independent stevedoring contractor. The Petitioner, in support of this amazing claim, merely states that it was never intended, when The Compensation Act was passed, that longshoremen be employed by anyone but independent stevedoring contractors. Petitioner is unable to refer to any exception or implication in The Compensation Act to support his claim that the term "employer" under The Compensation Act should be so limited.

B. Under the Maritime Law of the United States a vessel may be personified for certain purposes. Therefore, even if the Petitioner may not sue Moore-McCormack Lines, Inc., directly, as respondent, yet he may sue the *Mormacteal*, although this vessel is owned by the respondent, and the respondent must pay any damages for which its vessel may be found liable.

Being unable to supply any case in point, the Petitioner refers to the following three cases: *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 34 S. Ct. 733 (1914); *Inter-*

* 33 U. S. C. 905: *Exclusiveness of Liability.* The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

national Stevedoring Co. v. *Haverty*, 272 U. S. 50, 47 S. Ct. 19 (1926); and *Uravic* v. *Jarka Co.*, 282 U. S. 234, 51 S. Ct. 111 (1931), and cites these cases for the proposition that longshoremen are "seamen" and are, therefore, entitled to sue their employers for damages under the Jones Act. It need hardly be pointed out that each of these cases involves an action by a longshoreman against an independent stevedoring contractor and not against a shipowner-employer, and that, after the enactment of The Compensation Act in 1927, any such action was prohibited by Section 5 of that Act.

The Petitioner apparently refuses to recognize that this court in *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1, 66 S. Ct. 869 (1946) pointed out the obvious distinction between the rights of those "seamen" who are members of the crew and those "seamen" who load and unload vessels (longshoremen). (33 U. S. C. 903, 905)

In the *Swanson* case, this Court pointed out, in an opinion by Mr. Justice Stone, 328 U. S. 5, that

> "We have no occasion to consider here whether Congress by the Jones Act, undertook to or could give a remedy against the employer for injuries caused by a vessel to his employees, not members of the crew of the vessel, while working on shore. For Congress, by later legislation, has expressed its purpose to restrict the liability of the employer under federal statutes to injuries to his employees occurring on navigable waters or inflicted upon an employee who is either a master or a member of a crew of the vessel, injured in the course of his employment as such."

and, again at Page 7, Mr. Justice Stone said:

> "We must take it that the effect of these provisions of the Longshoremen's Act is to confine the

benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act."

In the face of the *Swanson* case, and after citing three cases by longshoremen against independent stevedoring contractors, the Petitioner makes the astounding statement at Page 7 of his Petition that

> "These decisions have never been overruled so as to change the right of maritime workers to sue employer-steamship companies for damages, for personal injuries when they are, as here, directly employed by them."

What the Petitioner is saying is that the cases holding that a longshoreman could sue his employer before the enactment of The Compensation Act should be applied today, ignoring the intent of Congress that the benefits and immunities of workmen's compensation should be applied to all longshoremen and to all employers of longshoremen.

(2) *All longshoremen are subject to The Compensation Act, regardless of by whom employed.*

Petitioner would have this Court believe that Congress, in enacting The Compensation Act, meant that Act to apply only to the relationship of longshoreman and independent stevedoring contractor and that The Compensation Act was not to apply when the longshoreman's employer happens also to be a shipowner. Petitioner's argument is based on the fact that in the *Haverty* case, (*International Stevedoring Co. v. Haverty*, 272 U. S. 50, 47 S. Ct. 19 (1926) a long-

shoreman was considered as included within the term "any seaman" in the Jones Act (46 U. S. C. 688), and consequently, had a right to the benefits of that statute in a suit against his employer, and because The Compensation Act was enacted subsequent to the *Haverty* case, Congress was simply providing a compensation act for independent stevedoring contractors in lieu of the Jones Act liability referred to in the *Haverty* case.

The Petitioner fails to note that the Hearings before the Committee of the Judiciary of the House of Representatives and before the Senate Judiciary Committee, 69th Congress, First Session, were held in March and April of 1926, months before the *Haverty* case was decided, and it was at these Hearings that it was made more than apparent that the persons who were considering the enactment of The Compensation Act, clearly understood that even in 1926, longshoremen were in some instances employed by steamship owners. For example: in the Hearings before the Committee of the Judiciary of the House of Representatives, held on April 8th, 15th and 22nd, 1926, on H. R. 9498, the following questions were asked by Congressmen Bowling of Alabama and Tucker of Virginia of Mr. Chlopek, who at that time was President of the International Longshoremen's Association:

> "Mr. Bowling: Would you mind telling us what the word 'longshoreman' includes? I live 500 miles from the ocean.
>
> "Mr. Chlopek: The word 'longshoreman' means a man who is engaged in loading and discharging a ship.
>
> "Mr. Tucker: Is he a federal employee?
>
> "Mr. Chlopek: Absolutely not. He is an employee of the contracting stevedore, *or the vessel owner who does his own stevedoring work*, unloading or

discharging his vessel in port." (Emphasis supplied).

And again at page 18, in a conversation between Congressman Hersey and Mr. Chlopek:

> "Mr. Hersey: When a longshoreman is injured in unloading a ship whom does he sue for damages under this bill?
>
> "Mr. Chlopek: Under this bill he could not sue anyone; he has workmen's compensation."

At page 40 of these hearings, Mr. Harry S. Austin, an attorney representing the International Longshoremen's Association, expressed the position of the Union to the effect that the Compensation Act was preferred by these Union groups to an employers' liability act similar to the Federal Employers' Liability Act, for railroad employees (45 U. S. C. 51, *et seq.*) because of the cost in time and money to longshoremen if they were required to institute law suits against their employers.

As a matter of fact, The Merchant Marine Act of 1920 recognized that longshoremen were then being hired directly by shipowners. Part of the Act of 1920 was the Ship Mortgage Act, 46 U. S. C. 911, *et seq.* Section 953 of that Act provides that upon a ship's mortgage being properly documented and filed, it shall become a maritime lien, but shall not be preferred to several other categories of maritime liens. Subdivision (a) of Sec. 953 describes one of such preferred maritime liens as "(2) a lien for damages arising out of tort, *for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel* • • •". (emphasis supplied)

The Ship Mortgage Act was enacted seven years prior to The Compensation Act. Therefore, Congress knew for

some time prior thereto that it was the practice in this country for shipowners as well as independent contracting stevedores to employ longshoremen.

At Pages 8, 9 and 10 of the Petition, the Petitioner points to various statements made by the persons testifying before the Senate and the House Judiciary Committees during the Hearings considering the enactment of the Longshoremen's and Harbor Workers' Compensation Act. These statements merely point out that, at that time some longshoremen were employed by independent stevedoring contractors. Not even the Petitioner is brash enough to say that, at that time there were no longshoremen employed by steamship owners. If one thing is clear, it is that, if the word "employer", as used in the Compensation Act, is to be limited to a particular category of employer, then that limitation can only come from Congress and to request that this Court change the meaning of that word is asking that the Court perform judicial legislation of the type which has been so recently condemned by this Court in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, 72 S. Ct. 277 (1952); and in *United States* v. *Atlantic Mutual Insurance Co.*, 343 U. S. 236, 72 S. Ct. 666 (1952).

At Page 11 of the Petition it is said that since this Court has granted a petition for certiorari in the case of *Hahn* v. *Ross Island Sand & Gravel Co.*, 320 P. 2d 668 (66 Or. Adv. Sh. 117) —Ore.—, it should grant certiorari here, since the issue here involves "another aspect of the same problem." The statement of the alleged issue in the *Hahn* case at Page 11 of the Petition is incorrect.

The *Hahn* case involved a revisit to the twilight zone concept announced by this Court in *Davis* v. *Department of Labor*, 317 U. S. 249, 63 S. Ct. 225 (1942) and does not involve any question concerning the exclusive liability provisions of Section 5 of The Compensation Act. The real

question in the *Hahn* case is whether an employee injured on a dredge permanently affixed to the shore has a right to select the compensation act of the State where the injury occurred, or is limited to the Longshoremen's and Harbor Workers' Compensation Act. The Oregon Compensation Act provides that the employer may elect whether to be subject to that Act. Under the Oregon Compensation Act, if an employer elects not to be subject to the Act, his employee may bring an action at common law.

The respondent-employer in the *Hahn* case voluntarily elected not to be subject to the Oregon Compensation Act. Consequently, in the *Hahn* case, if the State Compensation Act were to be applied, then, under his employer's option, Hahn would have had a right to sue his employer at common law.

The Oregon court held that the rule of the *Davis* case that certain workers who regularly work ashore, but who are injured on navigable waters may choose either State or Federal compensation does not apply where the choice is between Federal compensation or an action at law, even though the employer has voluntarily rejected coverage under a State Compensation Act.

In the present case, however, there is no question that The Compensation Act is the only compensation statute applicable. To say that the issue in the *Hahn* case, which, was,—whether the federal or state compensation act, or both acts, applied to the facts of that case—was the same as the issue in the case at bar, which is,—whether or not there should be a differentiation amongst the rights and immunities of employers of longshoremen—can only be an attempt to confuse.

(3) *Longshoremen have been employed by some shipowners for many years. During all this time there has never been any complaint from longshoremen's Unions, or from the great majority of steamship owners, who choose to hire longshoremen through independent contractors.*

The Petitioner, at page 12 of the Petition would have this Court believe that almost half of the longshoremen in the Port of New York are employed directly by shipowners. This is entirely incorrect.

While it is true that steamship owners comprise about 43% of the membership of the New York Shipping Association, the Petitioner has failed to point out that the New York Shipping Association is a membership corporation composed of many categories of member-employers.*

Of the 66 members of the New York Shipping Association who are steamship owners and agents, 22 employ harbor workers of some category. By no means all of these 22 employ longshoremen. The harbor workers employed by the 22 shipowners in the port of New York are made up of the following among others: handymen, sweepers, porters, drivers, mechanics, clerks, plumbers, coopers, carpenters, cargo checkers, ship fitters, electricians, designers, watchmen, guards, painters, baggage handlers and handlers of ship's stores. Most of the shipowners who hire the above employees do not hire "longshoremen" directly.

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* The New York Shipping Association is composed of the following groups: 66 steamship lines and agents; 47 contracting cargo repairmen; 10 contracting cargo checkers and clerks; 3 contracting maintenance workers; 16 contracting marine carpenters; and 11 contracting watching agencies.

If, as the Petitioner contends, a shipowner is not an employer within The Compensation Act, and, therefore, the immunity provisions of Section 5 of that Act do not apply to a shipowner, then, not only the longshoremen *per se* (viz. men who load and unload cargo), but a virtual host of harbor workers,—all of whom now are, and who have traditionally been employed by shipowners,—will not be subject to The Compensation Act, and, if injured on board a vessel in navigable waters, would be able to sue their employers under the General Maritime Law and, if their work is such that the unpredictable test of the *Sieracki* case (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872 [1946]) is met, viz., if they are doing work which is determined to have been traditionally performed by seamen (members of the crew) each of such harbor workers may have a right to sue his employer under the Jones Act. On the other hand, if longshoremen or harbor workers employed by shipowners are injured ashore (and many longshoremen and harbor workers at times work ashore) then they will be confined to recovery under the local State Compensation Act.

It is quite apparent that, if Petitioner's view were accepted, it will result in a virtual abandonment of The Compensation Act, for the shore-side employees of shipowners and the adding of chaos to a presently clear legal situation.

(4) *The legal fiction of the personification of a vessel.*

The most recent case in which this Court dealt with the subject of this legal fiction was *Consumers Import Co., et al.* v. *Kabushiki Kaisha Kawasaki Zosenjo, et al.*, 320 U. S. 249, 64 S. Ct. 15 (1943), where a shipowner defeated a claim

against it for cargo damage by referring to the so-called "Fire Statute" (46 U. S. C. 182*), which provides, in effect, that a shipowner shall not be held liable for damage to cargo due to fire, unless it be found that the fire was caused by the "design or neglect of such owner". The question before this Court in the *Consumers Import* case was: Does the fire statute extinguish *in rem* liability against the vessel for cargo damage, or is it confined to *in personam* liability only?

The cargo claimant in the *Consumers Import* case contended that, in spite of the statutory personal exoneration of the owner, the vessel was, nevertheless, individually bound to pay for the damage to the cargo because of the "personification" fiction. Mr. Justice Jackson of this Court referred to *The City of Norwich,* 118 U. S. 468, 6 S. Ct. 1150 (1886), in which it was held that the limitation of liability statutes (46 U. S. C. 181, *et seq.*) not only limited the *in personam* liability of a shipowner, but also any obligation of an owner to pay indirectly because of the attachment of a vessel owned by him.

Justice Jackson referred to the following language in *The City of Norwich,* Page 503, 118 U. S.:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles."

Justice Jackson, after making reference to the above quotation, continued, in his Opinion in the *Consumers Import* case, by saying, at Page 253:

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*"46 U. S. C. 182: Loss by fire. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

> "* * * The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age."

Mr. Justice Jackson continued at Page 254, as follows:

> "* * * There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not 'make good' to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them."

This Court in the *Consumers* case was affirming an opinion by Judge Learned Hand in the Court of Appeals for the Second Circuit found at 133 F. 2d 781, in which opinion, at page 784, Judge Hand said:

> "* * * To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing. That notion has indeed had its place in the law of the sea, but it is a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise."

Mr. Justice Holmes of this Court, has made clear in his opinions that he agreed with Judge Learned Hand and with Mr. Justice Jackson that the personification theory applied in Admiralty is nothing more than a legal fiction, not to be used indiscriminately. See: *The Eugene F. Moran*, 212 U. S. 466, 29 S. Ct. 339 (1909); and *The Western Maid*, 257 U. S. 419, 42 S. Ct. 159 (1922).

There has been some recent scholarly research into the personification theory by Professors Gilmore and Black, the authors of a recent text (1957) on the Law of Admiralty. In paragraphs 3 to 18 of Chapter 9, these authors have spent some time in exploring the original theories underlying the creation of a maritime lien and the tangential fiction of the personification of a ship. The conclusion concerning this subject reached by the above authors is worthy of repetition here (page 510 of the above text):

> "It may be concluded that the fiction of ship's personality has never been much more than a literary theme. As such it reached a height of popularity toward the turn of the century. Since then even as literature it has fallen into disrepute; thanks in part to the influence of Holmes and Learned Hand. Fictions serve many useful purposes in the law. Initially their introduction is apt to be a sign of disturbance and growth. But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of ship's personality, is always to be welcomed."

The incongruity of requiring a shipowner unconditionally to supply compensation payments and medical benefits to his longshoremen-employee, and, in spite of the specific immunizing provisions of Section 5 of The Compensation Act, also requiring the same shipowner to respond in money damages to the same employee, through the artificial means of a suit *in rem* against the vessel is apparent if one examines various sections of The Compensation Act.

Section 33 of the Act (33 U. S. C. 933) provides that an injured longshoreman may elect to attempt to hold "some person other than the employer" liable for his injury. When a longshoreman so elects, he has a right to sue that

"person other than the employer" and, if he is successful in recovering damages in that suit, he must reimburse his employer for the amount of compensation paid. There is likewise a *pro tanto* cancellation of any further compensation which may be due from his employer under the Act. If the longshoreman-employee is not successful in his action under Section 33 against the "person other than the employer", he may still claim further compensation benefits from his employer. It is merely playing with words to say that the employer's vessel is some person other than the employer when, as a matter of fact, the employer must necessarily pay for any recovery made by the libelant in his suit against the vessel.

The Petitioner must concede that from any recovery against the respondent-employer, *qua* shipowner, he will have to deduct and pay back to respondent-employer, *qua* employer, all the benefits which he has already admittedly accepted under The Compensation Act.

One of the objects of any compensation act is to secure speedy payment of benefits. Under The Compensation Act, an employer who desires to contest its liability under that Act to an injured employee is entitled to a hearing. After it is determined that the employer must pay compensation by reason of an award made by the Deputy Compensation Commissioner, any right of action which the injured employee may have against a third party is assigned to the employer by operation of law (33 U. S. C. A. 933b). Thus, if the Petitioner's theory was correct, we would have the anomalous situation of the respondent being the assignee of a claim against itself.

Since The Compensation Act was passed in 1927, it has been amended on 13 occasions. Congress changed 30 sections, a total of 89 times, but Section 5 (33 U. S. C. 905) has never been amended. Clearly, if the Petitioner's claim to

the effect that shipowners were not meant to be included within the purview of The Compensation Act is valid in any sense, then Congress, which has been particularly active in amending The Compensation Act, would certainly, by the simple amendment of Section 5, have made it clear that it was not intended that the Act should supply immunity in cases where longshoremen are employed by ship operators.

(5) *The prior unsuccessful attempts to hold an employer's vessel liable in rem when the same employer has complied with the provisions of The Compensation Act.*

The cases which have refused to abandon the modern overall purposes of The Compensation Act to the vagaries of mythology and a limited archaic fiction, have ample support in the writings of the leading jurists in this field. These cases are: *Samuels* v. *Munson S. S. Line,* 63 F. 2d 861 (5 C. A. 1933), where the facts were identical with those in the case at bar, and where the Court of Appeals for the Fifth Circuit refused to require a shipowner-employer to pay indemnity beyond the prescribed limits of The Compensation Act for an injury to a longshoreman.

In *Smith* v. *The Mormacdale,* 198 F. 2d 849, (3 C. A. 1952); cert. den. 345 U. S. 908, 73 S. Ct. 648, the Court of Appeals for the Third Circuit treated the same problem in an identical way.

In the *Smith* case, the Court referred to the personification theory as "a convenient conceptual tool" which may be used wisely when seeking security. The Court refused, however, to thwart the clearly manifested intention of Congress as expressed in The Compensation Act.

The further instances where The Compensation Act, has been sought to be set aside are cases in the United States District Court for the Southern District of New

York. They are: *Vitoxi* v. *SS Platano*, 1950 A. M. C. 1686 (not officially reported); and *Conzo* v. *Moore-McCormack Lines*, 114 F. Supp. 956 (1955). For an analogous situation, treated in the same fashion, see *Ginnis* v. *Southerland*, 50 Wash. 2d 557, 313 P. 2d 675 (1957).

Thus it appears that every Court which has been asked to extend the personification theory to a point where it would interfere with the modern public policy expressed by The Compensation Act has expressly refused to do so. It is apparent that the judges who decided these cases felt that to so apply it would not only be contrary to public policy, but would be contrary to common sense.

(6) *The cases cited by the Petitioner are not relevant. No case holds, or even implies that The Compensation Act does not apply to every employer of longshoremen.*

In *The Pacific Pine*, 31 F. 2d. 152 (D. C. W. D. Wash. S. D. 1929), the longshoreman-libelant was employed by an independent contracting stevedore. The only thing the *Pacific Pine* case held was that, where a shipowner is liable to be sued *in personam* as a third person,—that is a person other than an employer—by a longshoreman, then that third person's vessel may also be attached *in rem*.

The quotation from the case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872 (1946) at page 3 of the Petition is taken out of context and does not mean that the *Sieracki* case was intended to over-rule *Swanson* v. *Marra Bros.*, 328 U. S. 1, 66 S. Ct. 869 (1946). [The opinions in the *Swanson* and *Sieracki* cases were handed down on the same day.] Nowhere in the *Sieracki* case is it said, or even implied, that a shipowner who employs longshoremen need not provide federal workmen's compensation coverage to all employees within that Act.

The other case relied upon by the Petitioner is *Grillea* v. *United States*, 232 F. 2d. 919 (2 C. A. 1956). However, it is apparent that the facts in the *Grillea* case are materially different from those in the case at bar. The vessel, in the *Grillea* case was owned by a person other than the libelant's employer, viz. by a person who would be a third party within the meaning of Section 33 of The Compensation Act. There never was any defense imposed in the *Grillea* case that The Compensation Act afforded immunity to the respondent, United States, as a person, nor to the vessel, for the vessel was owned by persons "other than an employer."

Conclusion.

(1) The Petition does not represent a complaint from labor or management concerning the relationship between employee-longshoreman and employer-shipowner. Indeed, the Petition represents only the fifth time since 1927 that an attempt has been made to circumvent The Compensation Act by a reference to the personification fiction.

(2) The fact that longshoremen may be entitled to the rights of "seamen" does not mean that they are to be considered to have the same right and immunities as "seamen" who are members of a crew. Shipowners, as a regular practice, hire many more "harbor workers" than they hire "longshoremen". The Petitioner's theories would disrupt the entire workings of The Compensation Act, which controls the relationship of the shipowner and the harbor worker, for if a longshoreman is not subject to the Act when employed by a shipowner, then numerous categories of harbor workers must necessarily be in the same position.

(3) In the six years since certiorari was denied in *Smith v. Mormacdale,* 198 F. 2d 849, (3 C. A. 1952) cert. den. 345 U. S. 908, 73 S. Ct. 648, no material change has taken place. Section 5 of The Compensation Act has not been changed and there has been no complaint by the steamship industry or by the contracting stevedores concerning the fact that some shipowners hire their longshoremen directly.

Each infrequent attempt by an individual to affect judicial legislation concerning The Compensation Act has been unsuccessful. Any change made in the meaning of The Compensation Act should be made by Congress and not by this Court.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: New York, N. Y., July 30, 1958.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1957

No. 97

WILLIE BENNETT,

Petitioner,

against

S.S. MORMACTEAL, her engines, etc., and MOORE-McCORMACK LINES, INC.,

Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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No.

WILLIE BENNETT,

Petitioner,

against

S.S. MORMACTEAL, her engines, etc., and MOORE McCORMACK LINES, INC.,

Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

I. Is *In Rem* Liability a Legal Fiction Which Should Now be Abandoned?

Respondent argues that the admiralty principle of the personification of a vessel is a legal fiction which has outlived its usefulness, and should now be eliminated. To support this view, it cites *Consumers Import Co., et al.* v. *Kabushiki Kaisha Kawasaki Zosenjo, et al.*, 320 U. S. 249, 64 Sup. Ct. 15 (1943); *The City of Norwich*, 118 U. S. 458, 6 Sup. Ct. 1150 (1886); *The Eugene F. Moran*, 212 U. S. 466, 29 Sup. Ct. 339 (1909); *The Western Maid*, 257 U. S. 419, 42 Sup. Ct. 159 (1922); and an excerpt from Gilmore and Black on the Law of Admiralty (1957) at page 510.

Respondent states that the *Consumers Import Co.* case is the "most recent case" in which this Court dealt with this subject matter. A decision of this Court, more recent than all of the cases relied upon by respondent, is *Canadian Aviator, Ltd.* v. *U. S.*, 324 U. S. 215, 224, 65 Sup. Ct. 639, 644 (1945), in which Mr. Justice Reed stated at page 224:

> "Such personification of the vessel, treating it as a juristic person whose acts and omissions, although

> brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court. (Citing cases.)''

Respondent also places great reliance upon the opinion of Judge Learned Hand in the *Consumers Import Co.* case, while that case was still in the Court of Appeals. That was not a personal injury suit involving an injured longshoreman attempting to recover damages for his hurt based on *in rem* liability. On the other hand, *Grillea* v. *U. S.*, 232 F. (2d) 919 (C. A. 2d, 1956), was a recent opinion by Judge Learned Hand in just such a longshoreman's personal injury case. *Grillea* was based on *in rem* principles and unseaworthiness, on the government's consent to be sued under the Suits in Admiralty Act (46 U. S. C. A. 743).[1]

Whatever may have been Judge Learned Hand's thoughts as expressed in the *Consumers Import Co.* opinion, it is clear that he stated in *Grillea,* at pages 923, 924, much

[1] Respondent indicates that in *Grillea* the attorneys representing the vessel did not raise or rely upon the Longshoremen's Compensation Act as constituting a defense. We also note the mistaken statement in Judge Abruzzo's opinion (the district judge who rendered the decision in the instant case) that in *Grillea,* respondent did not call the Court's attention to the *Smith* and *Samuels* cases. We have carefully examined the papers and briefs which were submitted to the Court of Appeals in the *Grillea* case, and there is no doubt that the *Smith* and *Samuels* cases were called to the attention of the Court of Appeals, and that the very point relied on by the respondent here, was made in that case. The *Grillea* opinion was rendered following a petition for rehearing, made on behalf of the injured longshoreman. The government was represented by the same attorneys who represent Moore McCormack Lines Inc. here. The government cited both the *Smith* and *Samuels* cases under Point III of its answer to said petition for rehearing, in which it expressly made the argument that the exclusive remedy provisions of the Longshoremen's Compensation Act immunized not only the shipowner and operator, but also the vessel *in rem.* This argument was rejected by Judge Learned Hand in his opinion referred to above.

more recently, i.e. in 1956, that the question raised by the respondent posed

> "the question whether a maritime lien can be imposed upon a ship for a claim on which no jural person is liable, 'in personam'. Moreover, although in the case at bar the demisee (steamship company) was liable under the Longshoremen's and Harbor Workers Act, 33 U. S. Code, Section 301, the liability was only for compensation—a claim different from that in suit, both in kind and amount. So far as we have found, this is a question that has never come up in the books, although, as *res integra*, we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'." (parenthetical matter supplied)

Actually, in the *Consumers Import Co.* case, this Court did hold that the limitation of liability provisions contained in the Fire Statute would apply not only to the owner, but also to the vessel itself. But the Supreme Court expressly pointed out there that the shipper of cargo protects himself against fire losses in commercial practice, as a practical matter, and if the ship were to continue to be fully liable *in rem*, it "would restore the insurance burden at least in large part, to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England". The statute was therefore interpreted so as to carry out the intent of Congress, *i.e.* that cargo insurance should bear the loss, if the applicable facts brought the case under the statute.

It is interesting to compare this language with that contained in the *Sieracki* case, in which Mr. Justice Rutledge stated at page 94, "And beyond this, he (the shipowner) is in a position, as his worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost" (parenthetical matter supplied). The intent of Congress here, in personal injury cases of maritime workers, was that the shipping community, and its insurance, was to bear the loss or cost of indemnity.

City of Norwich, supra, and *The Eugene F. Moran, supra*, also were not personal injury cases. In the latter case, the Court ruled that an innocent car float owned by a railroad could not be sued *in rem*, where it was merely an appendage of a wrongdoing tug owned by another company. In refusing to extend the doctrine of independent personality to a vessel not guilty of any fault or wrongdoing, Mr. Justice Holmes made the following remarks:

> "* * * No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible, on principles of agency or otherwise, is carried further here than in England. The China, 7 Wall. 53, 19 L. ed. 67; The Barnstable, 181 U. S. 464, 467, 468, 45 L. ed. 954, 957, 21 Sup. Ct. Rep. 684; Homer Ramsdell Transp. Co. v. La Campagnie Generale Transatlantique, 182 U. S. 406, 413, 414, 45 L. ed. 1155, 1160, 21 Sup. Ct. Rep. 831. See The Blackheath (United States v. Evans), 195 U. S. 361, 366, 49 L. ed. 236, 237, 25 Sup. Ct. Rep. 46."

In *The Western Maid, supra*, the question involved was whether a public vessel owned by the government, could be liable *in rem*, where the government had not waived sovereign immunity. In answering this in the negative, Mr. Justice Holmes held that the doctrine of sovereign immunity applies not only to governments, but also to government vessels, in the absence of waiver, stating, however, at page 433:

> "It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force. See Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal, 251 U. S. 48, 53, 40 Sup. Ct. 66, 64 L. Ed. 130."

In other words, the cases on which respondents rely, recognize the principle for which petitioner here contends.

In *The John G. Stevens*, 170 U. S. 113, 18 Sup. Ct. 544 (1898), the Court quoted with approval from the language in *The China*, 7 Wall. 53, 68, as follows:

> "The maritime law as to the position and powers of the master and the responsibility of the vessel is not derived from the civil law of master and servant nor from the common law. It had its source in the commercial usages and jurisprudence of the Middle Ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditor."

There is another recent case in which Judge Learned Hand expressly recognized the important distinction between *in rem* and *in personam* liability in admiralty, i.e. *Burns Bros* v. *The Central R.R. of N. J.*, 202 F. (2d) 910 (C. A. 2d, 1953), where that Court stated, at page 912:

> "As is well known, it has from the beginning been true that in suits *in rem* the vessel has been regarded as tort feasor. * * * it is hard to explain the present law as to liens for collision on any other theory than as a vestigial devolution out of the notion that anything that moves and kills a man shall be deodand to the king."

Thus, in *U. S.* v. *The Little Charles*, 26 Fed. Cas., page 979, No. 15,612, Circuit Judge Marshall stated:

> "This is not a proceeding against the owner; it is a proceeding against the vessel for any offense committed by the vessel which is not less an offense * * * because it was committed without the authority and against the will of the owner."

The above quotation by Judge Marshall was quoted with approval by Judge Learned Hand in the *Burns Bros.* case.

In *1 Benedict on Admiralty*, 6th Ed. (Knauth), the principle is stated as follows at page 20:

> "The foundation of jurisdiction *in rem* is the taking of the vessel into the custody of the Court and the characteristic virtue of a proceeding *in rem* is that it operates directly upon the res as the titular re-

> spondent in the suit and the actual subject matter of the jurisdiction and not, as at common law, mediately through the right, title or interest of a party brought before the Court as defendant through personal service or the mere attachment of property as his with a view to subjecting his interest therein to the satisfaction of the judgment."

Robinson on Admiralty (1939) states at page 612:

> "For it must be remembered that if the owner resists liability in personam the ship is still liable in rem.
>
> * * *
>
> The innocence of any wrongdoing or negligence on the part of the owner does not safeguard her from this result of the 'personification' of a ship."

Mr. Justice Holmes, in *Liverpool, etc. Navigation Co.* v. *Brooklyn, etc. Terminal*, 251 U. S. 48, 53, 40 Sup. Ct. 66, 67, stated:

> "The notion as applicable to a collision case seems to us to be that if you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III, 'if my dog kills your sheep and I freshly after the fact tender you the dog, you are without recourse against me'. Fitz. Abr. Barre, 290."

In the *Severance*, 152 F. (2d) 916 (C. A. 4th, 1945), cert. den. 328 U. S. 853, 66 Sup. Ct. 1344 (1946), Circuit Judge Dobie stated at page 922:

> "It is of course trite to say that the inanimate vessel could have had no responsibility for the accident, but it is the distinguishing and characteristic feature of admiralty jurisprudence that a suit *in rem* may be brought against a vessel which is involved in an accident where loss of life or property is caused by the negligence of the owner or the men in charge."

It is, therefore, clear that when the Court in *Smith* v. *Mormacdale* referred to the *in rem* liability of a vessel as a

mere "legal fiction", and stated that the vessel could not be separated from its owner, it was postulating its conclusion on a completely erroneous premise; and it was merely following the Third Circuit decision in the *Samuels* case, which had been decided without any citation of authority to justify its conclusion.

II. This Honorable Court has Never Passed on the Precise Important Issues Involved Herein

Respondent relies on *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1, 66 Sup. Ct. 869 (1946). However, the *Swanson* case was a Jones Act suit by an injured longshoreman against the independent stevedoring contractor, which had employed him. He sought to recover damages for an accident which he had sustained while working on a dock alongside the vessel. The Court held that the Longshoremen's Compensation Act barred an employee of an independent stevedoring company from suing his own employer for such damages sustained on the dock. It is interesting to note that Mr. Justice Stone, however, pointed out that, in the Court's view (referring to Jones Act principles of recovery),

> "Congress intended to extend them to stevedores, the employees of an independent contractor while working on a vessel in navigable waters and while rendering service customarily performed by seamen."

As we have seen, the *Swanson* case involved an accident occurring on land, while the *Sieracki* case, which was decided by the Supreme Court on the same day, involved an injury sustained aboard a ship. In the latter case, the Supreme Court also took pains at pages 89-90, to point out that the injured longshoreman was employed by an independent stevedoring contractor and that "there could be no question of petitioner's (the steamship company's) liability for respondent's injury incurred as they were here, if he had

been in petitioner's employ rather than hired by a stevedoring company". In other words, in *Sieracki*, the Court ruled that it was giving the injured man the same rights he would have had, were he employed directly by the steamship company. At page 101 of that decision, the Court also expressly pointed out that "the Compensation Act did not have the effect of withdrawing from longshoremen all of the other obligations relating to personal injuries, which otherwise might be available to them under the General Maritime Law". In the face of this language, how can it be fairly said that a longshoreman employed by a steamship company shall have less right to a remedy for failure to supply a seaworthy vessel, than one employed by an independent contractor?

Respondent also calls attention to Section 953 of Title 46 of the U. S. Code (The Ship Mortgage Act). This favors petitioner's position. It indicates that Congress recognizes that in the rare instances in which a stevedore is employed directly by a shipowner, he is entitled to the same preferred maritime lien for wages as is given to a seaman.

Respondent also refers to a statement made by a longshore union official at a Judiciary Committee hearing, to indicate that Congress was aware of the distinction between longshoremen employed directly by shipowners, and longshoremen employed by independent stevedoring contractors. Having previously argued that no distinction was recognized in the Compensation Act, respondents then take an apparently opposing view. The logic of the argument seems elusive. In any event, it is difficult to see how isolated instances can assist the Court in construing what Congress intended, insofar as the issue here is concerned, at the time it actually passed the Compensation Act in both Houses. Is it reasonable to suppose that the members of both Houses expressly had in mind, at that time, "the instances, presumably rare, where he (the longshoreman) may be hired by the owner"? *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 102, 66 Sup. Ct. 872 (1946).

Conclusion

This case presents important questions involving basic rights of longshoremen. The decision of the Court below brings about a discriminatory rule not only as between different groups of longshoremen, but also as between different groups of ship operators. Furthermore, it strikes at the very foundations of an important and distinctive admiralty principle, i.e. the independent liability of a vessel *in rem*, as a juristic personality, responsible for its own torts.

It is respectfully submitted that these important questions should be reviewed by this Honorable Court.

Respectfully submitted,

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